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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 701

BENDIX AVIATION CORPORATION,
Appellant,

vs.

INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,
Appellee.

PETITION FOR REHEARING.

NATHAN LEVY,
811 J. M. S. Building,
South Bend, Indiana,
GEORGE N. BEAMER,
RICHEY W. WHITESELL,
JAMES W. OBERFELL,
Counsel for Appellant.

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INDIANA DEPARTMENT OF STATE REVENUE, INDIANA REVENUE BOARD, INDIANA GROSS INCOME TAX DIVISION,

Appellee.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated March 3, 1958, granting the motion of the Appellee for the dismissal of this appeal and in support thereof respectfully shows:

GROUNDS FOR REHEARING.

This petition, entitled in accordance with Rule 58 of the rules of this Court, represents an effort to obtain a reconsideration of the dismissal of the above captioned appeal and a full hearing with briefs and oral argument rather than the hearing afforded by the limited scope of a Jurisdictional Statement, motion and reply.

We are aware that this petition must be conceived by counsel in the darkness of our lack of knowledge of those considerations by which it was determined that the federal questions lacked substantiality. The only questions raised were federal questions and their seeming substantiality to Appellant and Appellee, their respective counsel, and the Courts below, is attested by the opinions below. With such objectivity as can be mustered by counsel for an Appellant after the dismissal of the Appellant's appeal, it is submitted that the federal questions hereinafter discussed should, with full respect, though contrary to the opinion of this Court, be characterized as substantial.

A.

The Common Carrier as Agent.

Appellant received gross income for doing all of the acts required by it under a contract with the United States of America. Until the contract was completely performed by Appellant there could be no gross receipts. Appellant in failing to fulfill the contract would, as a matter of fact, open itself to an action for breach of contract. The gross income which came to Appellant was single and undivided and arose out of the fulfillment of its total obligations under the contract. Under Indiana law, if there are no gross receipts, there is no taxable event. No "local Indiana commerce" produced gross receipts to which the gross income tax of Indiana could attach. From what did the gross receipts arise? From the fulfillment by Appellant of the totality of its obligations, including contractually, economically and physically, as an unseparated and inseparable part, the delivery of the goods on board a common carrier accompanied by shipping papers showing an out-of-state destination.

If "acceptance" (hereinafter discussed under point "B") is given the very meaning which Appellee urges, it was still true that no agent of the United States Government was present to take the goods themselves into custody and control, and the Appellant still had the obligation of getting them on board the proper common carrier accompanied by the proper shipping papers so that they would arrive at their destination outside of Indiana. If the Appellant failed to do this, there was no gross income. If the Appellant did this, there was gross income which could, under the Indiana Gross Income Tax Law be reached only by a tax levied directly upon it and unapportioned as between local and interstate acts. The tax so imposed was held invalid under earlier rulings of this Court, unchallenged by Appellee, and not set aside by this Court. This section of the petition adopts what is believed to be an erroneous interpretation of "acceptance", but nonetheless we are left with a situation in which the tax could not, under earlier decisions, apply unless the common carrier which received the goods placed upon its equipment f.o.b. the State of origin, became a mere agent of the United States by virtue either of the facts already cited or by virtue of the fact that a Government bill-of-lading was used. Is the common carrier an agent in the sense that the United States of America is transporting its own goods in the relationship of principal and agent with the carrier? If this ruling of the Supreme Court of Indiana, and this argument of the Appellee in its motion to dismiss, form any part of the basis for the actual dismissal of the appeal, then we submit that this represents an approach entirely new to constitutional considerations with respect to the position of a common carrier's relationship to its customer in interstate transactions.

No lawyer and no Judge, including the members of the Supreme Court of Indiana, could conscientiously state that

he believed as a result of his knowledge of American Constitutional Law that a common carrier would be treated as and considered as a true agent as opposed to a means, an agency, in the circumstances of the instant case. This reasoning, as adopted by the Supreme Court of Indiana, and if included as a consideration in the dismissal of the appeal, would usher in a wholly new concept and approach to the problems of state and local taxes and their validity or lack of validity in terms of the Commerce Clause. Without referring specifically to the language appearing in many earlier opinions of this Court, we feel it may be fairly said that this Court has never in any case dealing with the applicability of the Commerce Clause suggested by the merest shadow of an inference that a common carrier in its capacity as a common carrier hauling goods not for itself but for another could be considered an agent in that one necessary sense required to uphold this portion of the decision of the Supreme Court of Indiana.

The relationship established by a bill-of-lading between the shipper or consignor and the common carrier does not work to make the common carrier an agent in the law of contracts, in the law of carriers, in constitutional law or in law anywhere.

To Appellant's knowledge, no other State has attempted to impose a gross receipts or sales tax on outgoing interstate sales because of shipment made on a Government bill-of-lading or because a common carrier was deemed to be the agent of the purchaser, or because title passed to the purchaser on delivery of the goods to the common carrier, or because in its quasi-agency status the carrier "accepted" possession of the goods for the purchaser, or because of the purchaser's inspection and approval of the condition of the goods in the seller's factory. No decision of this Court has ever approved any such basis for imposition of a state tax.

To the contrary, for example, the natural gas purchased in Texas by the Interstate distributor in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, had to be processed to the purchaser's specifications in Texas before the purchaser took possession of the gas in Texas for interstate transportation out of Texas. The purchaser's "acceptance" of the gas in Texas did not convert the transaction into local, intrastate commerce.

The bulky road building machinery sold in interstate commerce in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, was presumably tested, inspected and approved by the purchaser in Indiana before the machinery was delivered to the carrier and before burdensome transportation costs were incurred. (Anyone familiar with the Adams Company's operations in Indianapolis would know this to be true.) This Court did not even consider the factor of such inspection and acceptance or the factor of making delivery to a carrier as agent for the buyer in its opinion in that case. Those factors were apparently not then deemed relevant to the question presented, whether the transaction was in interstate commerce.

In *Gross Income Tax Division* v. *W. D. Conkey Co.*, 228 Ind. 352, 90 N. E. (2d) 805; cert. den. 340 U. S. 941, the seller shipped bookcases from Indiana in the purchaser's name as consignor to the purchaser's customers in other states. The common carrier bill-of-lading ran to the purchaser, the same as a Government bill-of-lading runs to the Government, and the carrier would have occupied the same alleged status as agent of the purchaser, yet the Indiana Court held the transaction exempt from the Indiana tax on Commerce Clause grounds, and this Court denied review by certiorari. If the federal question here is insubstantial, then it was certainly substantial in the *Conkey* case, was wrongly decided by the Indiana Court and should have been accepted for review and reversal by this Court.

The questions here presented are, therefore, most substantial and seriously affect the commerce of the country, the revenue of the state and burden imposed on the Federal Government.

The most common form of purchase and sale in America calls for the shipping formula used in these contracts, that is to say, delivery f.o.b. the point of origin on board the equipment of a common carrier designated by the buyer. Is it not appropriate to say that in the multitude of cases dealing with interstate commerce not one has ever treated of the common carrier under these circumstances as an agent of such a buyer. If it be contended that the particular question is not as broad as the foregoing question since a Government bill-of-lading was used in the instant case, then, does it not yet remain appropriate to urge the substantiality of the question since a Government bill-of-lading has never in a case involving the applicability of the Commerce Clause been considered under this fact arrangement by the Supreme Court of the United States? Not only are the particular tax funds held by the State of Indiana and sued for by this Appellant at the direction of the United States of America, as provided in the contracts, at stake, but vast future economic concerns of both our Federal and State Governments are also involved. Not only are the economic concerns of the Federal and State Governments involved but grave doubts must necessarily spring forth concerning the tax status of all commercial transactions requiring shipment f.o.b. the equipment of a common carrier.

B.

"Acceptance", a Verbal Accident.

If, in the darkness of our lack of knowledge, our groping has not touched one of the bases for dismissal of appeal in Part A, then we feel that the only remaining possible basis must be a by-product of the word, "acceptance". As indicated above, even the resolution of the meaning of "acceptance" in a manner most favorable to Appellee does not result in a taxable transaction under the Gross Income Tax Law of Indiana. The "acceptance" under this unfavorable interpretation would give title to the United States of America at a moment, at a time briefly preceding actual delivery on the common carrier, but it would not produce any gross receipts which could be taxed under the limited incidence of the Indiana law. The most that can be said for "acceptance" by the United States is that such acceptance was a condition precedent to the performance of other acts by Appellant and that the "acceptance" produced no gross income. No tax can arise until there are gross receipts; no gross receipts until delivery on board the common carrier accompanied by appropriate shipping papers.

However, the history of the word, "acceptance" in this case is worthy of a moment's reflection. It appears in the contracts in a context saying, in effect, that "acceptance" may be prior to, after, or at the time of delivery, and that it may be of the kind that would be limited to an approval of the quality and quantity of the items produced under a contract. The argument that the "acceptance" was identical to that of the "acceptance" in the *Wood Preserving* case began in the Trial Court, which found to the contrary. It continued in the Supreme Court of Indiana, which neither accepted nor rejected the position of the Appellee on this factual question. The Supreme Court of Indiana recited a

contractual paragraph and indicated that it was satisfied, but in making its ruling it did not depend upon the "acceptance" set forth in the contract at all, but upon the Uniform Law of Sales, by which title is deemed to pass at the moment of delivery, unless a contrary intention is expressed by the parties. This is to be found in the opinion of the Supreme Court of Indiana (Jurisdictional Statement, Appendix "A", p. xii):

> "The parties seem to be in substantial agreement that at the time the manufactured articles were loaded on the carriers at the Bendix plants in Indiana, title and possession passed from appellee to the Government, and all control over its movement passed from Bendix.
>
> Uniform Sales Act, Acts 1929, ch. 192, § 19, p. 628, being § 58-203, Burns' 1951 Replacement."

We readily admit that all of the facts in this case were by stipulation and that if this question of the meaning of "acceptance" in and of itself is wholly determinative of this case, that this Court, in the exercise of its discretion, could determine that it could make the decision as to the meaning of "acceptance" without argument and without briefs despite the fact that one of the Courts below found to the contrary and the other Court below mentioned but ignored rather than relied upon it.

Candidly, counsel for the Appellant felt that this matter was in and of itself of such crucial importance and so inextricably bound up with the place of a Government bill-of-lading and with delivery f.o.b. the equipment of the common carrier that the determination would not be made without the opportunity for full briefing and argument. It may be that counsel for the Appellant lack the jurisprudential sensitivity by which one may appreciate the processes determinative of whether appeals will be dismissed or be permitted to go to argument, but it was not felt that on a question so crucial and in the face of a denial

of Appellee's position by the Trial Court and an obvious avoidance of the Appellee's position by the Supreme Court of Indiana, a decision would be reached summarily that "acceptance" in the instant case, a word taken from the contracts, and "acceptance" in the *Wood Preserving* case, a word taken from the judicial decision, were identical legal twins.

Conclusion.

For the foregoing reasons it is respectfully urged that the petition for a rehearing be granted, that the order dismissing the appeal be set aside, and that the Court enter an order noting probable jurisdiction.

Respectfully submitted,

NATHAN LEVY,
811 J. M. S. Building,
South Bend, Indiana,
GEORGE N. BEAMER,
RICHEY W. WHITESELL,
JAMES W. OBERFELL,
Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I, Nathan Levy, counsel for the above named Appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

NATHAN LEVY,
Counsel for Appellant.